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No. 77-1397

In the Supreme Court of the United States

OCTOBER TERM, 1977

ANITA ABRAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-56) is reported at 568 F.2d 411.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1978. The petition for a writ of

certiorari was filed on March 27, 1978 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's false testimony before a federal grand jury was sufficiently material to the grand jury's investigation to support her conviction for perjury.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of making material false statements before a federal grand jury, in violation of 18 U.S.C. 1623.[1] On Count II, petitioner was sentenced to 18 months' imprisonment and a fine of $1,000. On Count III, she was placed on three years' probation, which was to run consecutively to the sentence on Count II. In a comprehensive opinion, the court of appeals affirmed petitioner's conviction on Count II but reversed on Count III (Pet. App. 1-56).

The facts are not in dispute. In 1976 a federal grand jury sitting in the Southern District of Florida was investigating a series of insurance claims filed by the law offices of James A. Davis for clients who had received medical treatment from Doctor M. S. Fox or

[1] Petitioner was acquitted on Count I of the indictment and convicted on Counts II and III.

Westchester Hospital or both (Pet. App. 8). Petitioner, who worked as a secretary and bookkeeper in Davis's office (Tr. 127), was subpoenaed by the grand jury and was granted use immunity (Pet. App. 8).

During her appearance before the grand jury on July 26, 1976, petitioner was questioned extensively about a previous Florida Bar Association investigation of a cost breakdown that had been prepared by Davis's office for one of his clients (Pet. App. 42-56). In March of 1974, the client had complained to the Florida Bar Association about the amount she was to receive in settlement of her claim for an accident (Tr. 67). Upon inquiry by the Bar Association, petitioner signed a letter for Davis containing a "closing statement" on the case, which recited a $231.50 charge for "costs" (Tr. 66-67). The Bar Association subsequently requested that Davis itemize the $231.50 in costs (Tr. 133). In response to that request, petitioner signed a letter to the Bar Association on behalf of Davis, enclosing a putative breakdown of the costs (Tr. 133-134).[2]

Petitioner testified before the grand jury that the $231.50 figure was based on bills actually in the file prior to the settlement of the case, or on the cost sheet she prepared as the case progressed, or on cost cards maintained by the accountant (Pet. App. 42, 46, 51, 53, 54). In fact, as petitioner was aware, the cost

[2] The itemized costs included, among others, $75 for conferences with Doctor M. S. Fox, $107.50 for investigation and photography, and $35 for photographs (Pet. App. 10).

sheet had been totally fabricated (Tr. 84-85, 94-95, 119; Pet. App. 10-11, 14).

Petitioner was subsequently indicted for perjury in connection with her testimony before the grand jury. A week later, the grand jury returned an indictment against Davis and Fox, charging them with 105 counts of mail fraud.

ARGUMENT

Petitioner's false statements were plainly material. As the indictment alleged (Pet. App. 62), the grand jury was conducting an investigation into insurance claims filed by Davis's law office on behalf of clients. Settlement of these accident claims would be negotiated by Davis's office, and insurance drafts would issue, made out jointly to the client and Davis. After deducting attorneys' fees, medical expenses, and other costs, Davis's office would pay the remainder to the client (*ibid.*). Whether the expenses and costs deducted were actually incurred was therefore one of the main issues of the investigation. Petitioner's false testimony, in which she sought to justify the cost breakdown in one such case, and in which she concealed the fact that the costs had been fabricated, therefore went to the heart of the grand jury's inquiry. Her argument that her false testimony was not material to the grand jury's inquiry is, as the court of appeals characterized it, "frivolous" (Pet. App. 27).

Petitioner nonetheless contends (Pet. 8-10) that there is a conflict between the Eighth and the Fifth Circuits as to the proper definition of materiality for the purposes of 18 U.S.C. 1623. Under the Fifth Circuit's standard, testimony is deemed material if it is capable of influencing the grand jury on the issue before it, or if it would have the natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation. *United States* v. *Brumley*, 560 F.2d 1268, 1275 (C.A. 5); *United States* v. *Saenz*, 511 F.2d 766 (C.A. 5), certiorari denied, 423 U.S. 946; *United States* v. *Makris*, 483 F.2d 1082, 1088 (C.A. 5), certiorari denied, 415 U.S. 914; *United States* v. *Gremillion*, 464 F.2d 901 (C.A. 5), certiorari denied, 409 U.S. 1085. The Eighth Circuit states the test of materiality as whether the false declaration tends to influence, mislead, or hamper the grand jury's investigation of a matter within its authority to investigate. *United States* v. *Lasater*, 535 F.2d 1041, 1047 (C.A. 8); *United States* v. *Koonce*, 485 F.2d 374, 380 (C.A. 8). Although petitioner argues that there is a critical distinction between these two standards, we submit that they are virtually indistinguishable. Neither of the two Eighth Circuit cases on which petitioner relies suggests otherwise.

In *United States* v. *Koonce*, *supra*, the court held that the government had not introduced sufficient evidence to show that the false statement in the case was material to the grand jury's investigation, although the court declined to rule that the false state-

ment was immaterial as a matter of law. The statement at issue in that case was the defendant's false testimony about a boat that had been stolen some six years earlier. The court noted that the government had failed to introduce any evidence, other than the transcript of the defendant's grand jury testimony, to support its allegation that the false statement was material to the grand jury's inquiry. Since the transcript did not in any way indicate how the defendant's statement about the stolen boat was material,[3] the court held the evidence insufficient to support the defendant's conviction.

In this case, by contrast, as the court of appeals held (Pet. App. 27-28), the transcript of petitioner's three grand jury appearances made it clear that the grand jury was conducting an investigation of matters directly related to petitioner's false statements.

In *United States* v. *Lasater*, *supra*, the grand jury was conducting an investigation into the affairs of a former Missouri governor. One subject of the grand jury's inquiry was possible tax violations arising from transactions in a bank account maintained for the governor's benefit. The defendant was the president of a trust company that arranged the purchase and sale of municipal bonds, the proceeds of which were deposited into the bank account. The court noted

[3] The court noted that the statute of limitations for the state offense of stealing the boat had already run. The grand jury was apparently investigating possible tax offenses against the defendant, but that fact was not reflected in the record at trial (485 F.2d at 381).

that the defendant had acknowledged that the trust company was involved in the affair, with the purpose of currying favor with the governor. In the course of his testimony, however, the defendant had allegedly made false statements in which he minimized his role in the affair. The court held that these false statements were not material. While the defendant's false testimony as to the extent of his personal involvement in the transaction would clearly have been material to an investigation of *his* actions, the court found that it was not material to the investigation of the governor. In this context the court noted that the "perjury statute [should not] be invoked where the alleged misstatement relates only to a peripheral matter * * *." 535 F.2d at 1049.

Again, there is nothing in this case or other Fifth Circuit cases to suggest that the Fifth Circuit would reach a different conclusion on the same facts. Petitioner's false statements related not only to her own misconduct, but to fraudulent conduct in Davis's handling of payments to an accident victim, precisely the subject of the grand jury's investigation and the subsequent indictment of Davis and Fox.[4]

[4] The indictment charged that Davis and Fox had devised a scheme to defraud various insurance carriers, accident victims, and the Florida Bar Association. It alleged that the objects of the scheme included reducing payments to accident victims by deducting false and inflated medical bills and costs from the total amount of their settlement, and preventing the Florida Bar Association from conducting legitimate inquiries concerning the handling of accident claims by preparing and submitting false and inflated cost justifications (Pet. App. 26 n. 49).

Finally, petitioner suggests (Pet. 9) that in order for false testimony to influence, mislead, or hamper an investigation, it must deter the grand jury from completing its task. As the court below correctly stated (Pet. App. 27), "[t]he government need not show that because of the perjured testimony, the grand jury threw in the towel. Actual impediment of the investigation is not required. *E.g., United States* v. *Makris, supra; United States* v. *Gremillion, supra.*" See also *United States* v. *Howard*, 560 F.2d 281, 284 (C.A. 7); *United States* v. *Kelly*, 540 F.2d 990, 993 (C.A. 9), certiorari denied, 429 U.S. 1040.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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